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No.10-800

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

GREGORY WILSON, *Petitioner*

versus

LADONNA H. THOMPSON, IN HER OFFICIAL CAPACITY AS COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents

A CAPITAL CASE

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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CAPITAL CASE

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Should a new prerequisite be added when determining the date of accrual for method of execution challenges brought under 42 U.S.C. § 1983 to require that any habeas corpus proceedings be completed before the inmate may file such a challenge?

II. Should the statute of limitation begin anew when a state adopts an existing death penalty protocol as an administrative regulation without making any substantial change to the method of execution?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Sixth Circuit were adequately set out by the Petition.

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OPINION BELOW

The opinion of the Court of Appeals is reported at 620 F.3d 699 and is included in the Petitioner's Appendix A, pp. 1a-8a.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves 42 U.S.C. § 1983, as adequately set out in the Petition.

COUNTERSTATEMENT OF THE CASE

A. Substantive Facts of the Underlying Offense

The Supreme Court of Kentucky summarized the brutal kidnaping, robbery, rape, and murder of the victim, Deborah Pooley, in *Wilson v. Commonwealth*, 836 S.W.2d 872, 876-77 (Ky. 1992), *cert. denied*, 507 U.S. 1034 (1993). Debbie was forced into her own car at knife point and begged Wilson for her life as he raped her in the back seat. Wilson and a co-defendant coldly told her that they had to kill her so that she could not identify them. After dumping Debbie Pooley's naked body in a field in Indiana, the two co-defendants went on a shopping holiday with her credit cards.

B. Procedural History

Wilson was convicted of the brutal crime and sentenced to death for murder. *Wilson v. Commonwealth*, 836 S.W.2d 872 (Ky. 1992). This Court denied certiorari in 1993. *Wilson v. Kentucky*, 507 U.S. 1034 (1993). Wilson then pursued state post conviction proceedings in *Wilson v. Commonwealth*, 975 S.W.2d 901 (Ky. 1998) *cert denied,* 526 U.S. 1023 (1999). Ultimately, Wilson's petition for habeas corpus was rejected by the Sixth Circuit in *Wilson v. Parker*, 515 F.3d 682 (6th Cir. 2008) *cert. denied*, 130 S.Ct. 113 (2009).

After Wilson's conviction the Kentucky legislature

adopted lethal injection as the primary means of carrying out death sentences in the Commonwealth. KRS 431.220. That statute allowed those inmates already serving death sentences to select between the new lethal injection procedure or the former electrocution procedure. KRS 431.220(1)(b). Under the terms of the statute, the inmate is required to select electrocution at least twenty days prior to the scheduled execution. *Id.* If the inmate refuses to make an election, then the default method is lethal injection. *Id.*

The record before the District Court noted that, in July of 2004, Wilson and a group of other inmates evidenced their awareness of the lethal injection procedure by filing a group grievance. That grievance asserted that the types of drugs utilized, the timing of administration, and the amounts of the drugs utilized was "wrong" and alleged a civil rights violation.

On November 30, 2007, after Wilson's habeas petition had been rejected by the District Court, Wilson filed the present suit in the Eastern District of Kentucky, pursuant to 42 U.S.C. § 1983, alleging that the use of Kentucky's lethal injection protocol to carry out his death sentence would violate his constitutional rights. That suit was dismissed on September 30, 2009, as Wilson's claim was barred by the applicable statute of limitation. The District Court applied the Sixth Circuit's decision in *Cooey v. Strickland (Cooey II)*, 479 F.3d 412 (6th Cir. 2007), to reach the conclusion that Wilson's claim accrued, at the very latest, when he demonstrated

awareness of the Commonwealth's presumptive method of execution by filing his July 2004 grievance. Thus, the applicable one year statute of limitation expired, at the very latest, more than two years prior to initiation of his action.

C. Arguments Presented to the Lower Courts

The Petitioner's arguments substantially changed as this matter rose through the courts. It should be noted that the Petitioner did not challenge the applicability of *Cooey II* before the District Court. In fact, the Petitioner's counsel agreed that "*Cooey* does provide the basic analytical framework for determining the accrual date for method of execution claims" on page two of his Memorandum Opposing Defendant's Motion to Dismiss, filed as document twenty-eight in the District Court proceedings. Instead, Wilson relied upon the Kentucky statute that allowed him to elect electrocution in lieu of lethal injection to argue only that his claim could not possibly be ripe for determination until such an election had been made.

Shortly after Wilson's claim had been dismissed, the Supreme Court of Kentucky decided a case that had been pursued by other death row inmates, *Bowling v. Kentucky Dept. Of Corrections*, 301 S.W.3d 478 (Ky. 2009). The *Bowling* decision required the Department of Corrections to promulgate the death penalty protocol as administrative regulations. Kentucky complied, and the regulations became effective on May 7, 2010 (501 Ky.

Admin. Regs. 16:330).

Upon the filing of the Sixth Circuit brief, which was subsequent to the rendition of the *Bowling* opinion, it became evident that the Petitioner had completely changed his arguments. Instead of the argument made before the District Court, the Petitioner argued that the matter should be remanded in light of the *Bowling* decision. In the alternative, the Petitioner maintained before the Sixth Circuit that *Cooey II* had been wrongly decided. Notably, the Petitioner still failed to argue that the District Court's analysis or application of *Cooey II* had been flawed.

Upon considering these arguments, the Sixth Circuit affirmatively stated that it would not consider any argument that *Cooey II* was incorrect, as such an argument had not been made to the District Court. The Sixth Circuit further stated that it would not discuss the District Court's application of *Cooey II*, as that application was not challenged by the brief. Instead, the Sixth Circuit affirmed the ruling and determined that remand in light of *Bowling* was unnecessary as *Bowling* did not change the protocol or the applicable analysis.

REASONS FOR DENYING THE WRIT

The question that the Petitioner framed for this Court does not pose arguments that are squarely presented by this case. Given that the state court decision at issue was not decided prior to the conclusion of the District Court proceeding, that decision was never addressed by the District Court. Instead, the Petitioner changed course before the Court of Appeals to raise arguments that were entirely new, and thus, are not appropriate for *certiorari*. Further, the arguments presented by the Petitioner have been adequately addressed by the Sixth Circuit's opinion. That opinion is in agreement with the only other Circuit Courts that have considered this type of method of execution challenge. Thus, at most, the Petitioner is requesting that this Court take up a case that largely rests upon the District Court's application of the facts to the test for accrual set out by the Sixth Circuit in *Cooey II*.

I.

THE PETITIONER DID NOT RAISE OR LITIGATE THE QUESTION PRESENTED IN THE LOWER COURTS

As set out above, before the District Court, the Petitioner agreed that the Sixth's Circuit's decision in *Cooey v. Strickland (Cooey II)*, 479 F.3d 412 (6th Cir. 2007), provided the applicable guidelines for determining

when a method of execution claim accrued, and merely asserted that Wilson's claim could not become ripe until he manifested rejection of electrocution as a viable method for carrying out his death sentence. At the time of the District Court proceedings, the state court's decision in *Bowling* did not exist. Thus, the Petitioner has continued to craft new arguments at every level of these proceedings.

The Petitioner's argument before the Sixth Circuit significantly expanded above and beyond the limited stance taken before the District Court. However, the Sixth Circuit noted it would assume that the District Court's application of *Cooey II* was correct, due to the Petitioner's failure to assert any disagreement with that application. The Sixth Circuit also noted that it would not consider the new assertion that *Cooey II* was incorrectly decided, given that this argument was not raised before the District Court.

Now, before this Court, the Petitioner has melded and expanded his claim beyond all recognition by simultaneously asserting that the Sixth Circuit's *Cooey II* framework is flawed, while also asserting that the Sixth Circuit has inexplicitly misinterpreted *Bowling's* effect on that analysis. While there is no jurisdictional bar that would prohibit this Court from determining issues that were not presented to the lower courts, the Court has rejected such issues in the past. See e.g. *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980). This Court has stated that it will avoid questions that are not raised

or litigated in the lower courts, especially where the proponent of the question accepted a particular legal analysis before the lower courts. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (dismissing writ of *certiorari* as improvidently granted where Petitioner requested jury instruction).

Here, the question does not present a constitutional issue, and the Petitioner's statutory argument has been changed and re-crafted beyond recognition. As a result, the Petitioner is requesting that this Court examine the District Court's application of facts in light of a state court decision that did not exist at the time that the Petitioner filed suit, or when the District Court rendered its judgment. The Petitioner's argument also relies upon state administrative regulations that did not exist when he filed his action. The Petitioner also now challenges the underlying ruling in *Cooey II*, and its application herein, despite having expressly accepted its controlling precedential value before the District Court. Given the questionable procedural posture herein, this Court should deny the Writ.

II.

THE SIXTH CIRCUIT'S ACCRUAL ANALYSIS IS CONSISTENT WITH PRECEDENT AND WITH THE TESTS CREATED BY OTHER CIRCUITS

Even assuming, for the purposes of argument only

and without any concession, that the question posed by the Petitioner was addressed by the lower courts and was squarely and fully before this Court, the Writ should be denied. The Sixth Circuit's decision regarding claim accrual for method of execution challenges is fully consistent with precedent. It is also consistent with the decisions of other Circuits that have had the opportunity to address similar issues.

A. The Sixth Circuit's Opinion in this Matter and in *Cooey II* Fully Complied with Precedent

In *Wallace v. Kato*, this Court stated that accrual occurs when "the plaintiff has a complete and present cause of action" *Wallace v. Kato*, 549 U.S. 384, 388 (2007)(internal quotations omitted). This occurs when "the plaintiff can file suit and obtain relief." *Id.* The Sixth Circuit followed this guideline in *Cooey II*, which relied upon *Wallace*. *Cooey v. Strickland (Cooey II)*, 479 F.3d 412, 416 (6th Cir. 2007).

The Petitioner tacitly acknowledges, on pages 8-10 of the Petition, that Wilson could have filed his claim earlier. There seems to be no dispute that Wilson was aware of the Commonwealth's execution methodology prior to 2004. However, he asserts that method of execution claims filed and litigated in tandem with federal habeas corpus petitions will cause such a state of confusion that, for the purposes of this type of claim, a new prerequisite should be added to the test for claim accrual. Thus, he urges this Court to adopt a test that

adds to the requirement of *Wallace* that "all state and federal avenues of relief have been exhausted." Page 11 of Petition.

This Court's decision in *Hill v. McDonough*, 547 U.S. 573 (2006) defeats the Petitioner's first argument. This Court has already determined that issues that challenge a state's death penalty procedure are properly brought under 42 U.S.C. § 1983. Nothing in the *Hill v. McDonough* opinion suggests that method of execution challenges cannot proceed until the validity of the sentence is collaterally challenged through a petition for habeas corpus.

Likewise, the Petitioner's second suggestion, that a new prerequisite be included when considering accrual of such actions, is also without merit. There is no such requirement in any precedent. Indeed, the Eleventh Circuit has specifically rejected this method of calculation "because doing so would prolong unnecessarily the time during which a litigant should reasonably anticipate the need to file suit and would fail to show proper respect for principles of federalism." *McNair v. Allen,* 515 F.3d 1168, 1175 (11th Cir. 2008).

The Petitioner finds support for this new and added prerequisite only in the dissenting opinion in *Cooey II*. As a result, although the Petitioner asserts that *Cooey II* conflicts with *Wallace* - the Petitioner has failed to state any such conflict. Instead, it would be more precise to say that the Petitioner is proposing that this

Court adopt a new test for accrual that would apply only to method of execution challenges filed by condemned inmates. This proposal is based only upon an assertion that, simply stated, suggests that it would be beneficial to prolong the post conviction process by allowing capital defense attorneys to avoid simultaneous proceedings.

It should also be noted that the Petitioner's argument concerning the effect of the state court's *Bowling* decision did not render the then existing protocol *void ab initio*. Prior to *Bowling* the protocol was an internal operating procedure and was used to carry out death sentences. As the Kentucky Court noted, only a portion of the procedure had been promulgated by reference in other administrative regulations. After *Bowling* the Department of Corrections promulgated a larger portion of the protocol as an administrative regulation. The *Bowling* decision changed the classification of the document from internal procedure to administrative regulation, but in effect the pre-*Bowling* protocol remains the same as it was when Wilson filed his 2004 grievance.

B. The Sixth Circuit's Analysis is Consistent with the Approaches Adopted by Other Circuits

The question of when a method of execution challenge under 42 U.S.C. § 1983 accrues has only been addressed by three Circuits (including the Sixth Circuit). However, those circuits have adopted tests that are substantially similar. Both the Fifth Circuit and the

Eleventh Circuit have joined the Sixth Circuit in creating tests that conclude that accrual occurs upon the finality of conviction or upon a significant change in the presumptive method of execution.

The Eleventh Circuit (like the Sixth) has concluded that accrual occurs when the execution protocol becomes applicable to the inmate. *McNair v. Allen,* 515 F.3d 1168, 1177 (11th Cir., 2008). In further recognizing that methods of execution are subject to change, the Eleventh Circuit further noted that "a significant change in the state's execution protocol" would be required in order to have an impact upon the date of accrual. *McNair v. Allen,* 515 F.3d at 1177. In the case at bar, there was no significant change in the procedure.

In *Walker v. Epps,* the Fifth Circuit relied upon *Cooey II* and *McNair*, and agreed that accrual occurs upon finality of the conviction. However, the Fifth Circuit also noted that a change in the procedure would affect accrual by adding that "in the event a state changes its execution protocol after a death-row inmate's conviction has become final, the limitations period will necessarily accrue on the date that protocol change becomes effective." *Walker v. Epps*, 550 F.3d 407, 414 (5th Cir. 2008). Under this method, Wilson's claim accrued, at the latest, when Kentucky adopted lethal injection as the default method of execution in 1998 under KRS 431.220.

Thus, the application of the tests enunciated by the

Fifth Circuit, the Sixth Circuit, and the Eleventh Circuit also create the same result in the matter at bar. Each Court of Appeals that has examined the issue requires that a significant change in the procedure must occur before accrual will be affected. Under any of these tests, Wilson's claim accrued, at the very latest, in 2004, when Wilson fully evidenced his knowledge of Kentucky's execution protocol.

C. The Sixth Circuit Correctly Assessed the Effect of *Bowling* on Method of Execution Challenges

Given the substantial similarity between the three Circuits that have addressed the question, it is apparent that the Sixth Circuit correctly assessed the impact of the state court decision in *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478 (2009). As the Sixth Circuit noted, the regulations that were adopted by Kentucky under the Administrative Procedures Act (as required by the *Bowling* Opinion) were nearly identical to the protocol that existed and was extensively litigated prior to *Bowling*. 501 Ky. Admin. Regs. 16:330. In fact, the *Bowling* Court noted that some portions of that protocol had been included by reference in existing administrative regulations. Given further that Wilson's claims are extremely broad - it can only be concluded that there was no substantial change that should impact any accrual calculation. As the District Court determined, Wilson was aware of the protocol in 2004. Thus, his claim accrued no later than 2004. In fact, it is likely that his claim accrued upon the adoption of lethal injection in

Kentucky, in 1998.

CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky asks this Court to deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

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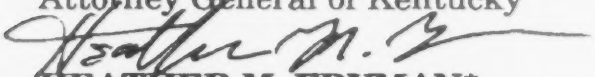

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